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March 31, 2022

Ms. Katie Johnson
Chair, NAIC Privacy Protections (D) Working Group
Bureau of Insurance
Tyler Building
1300 East Main Street
Richmond, VA 23210

Dear Ms. Johnson:

I am writing on behalf of a Coalition¹ of health insurers representing some of the country's largest major medical insurers and health maintenance organizations to comment on the NAIC's Privacy Working Group Draft Workplan Exposure ("Draft Workplan"). We offer the following comments, many of which have been raised previously, regarding the key issues that should be considered as part of the process of finalizing the Draft Workplan:

A Gap Analysis is Necessary

Our Coalition, in conjunction with the rest of the industry, has consistently argued that a gap analysis should be the first step of any work plan developed by the NAIC. It is important to understand any potential problems or gaps before we begin drafting revisions. We strongly recommend that the Working Group take the time up front to review all the existing NAIC models impacting privacy, and develop a clear and concise outline of the gaps that need to be filled before diving into a project to draft, or redraft, additional privacy requirements.

Changes to the Privacy Rules Must be Done Cautiously and Carefully

The United States Department of Health and Human Services ("HHS") published comments that share our concerns regarding well-intentioned, but potentially ill-conceived

¹ CVS Health/Aetna, Anthem, Cigna and UnitedHealthcare, who together provide health insurance and health maintenance organization coverage to more than 200 million members nationwide, are the members of this Coalition.

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privacy regulation. In the executive summary to its proposed modifications to the HIPAA privacy rule, the HHS specifically warns that when done improperly, privacy rules “could present barriers to coordinated care and case management—or impose other regulatory burdens without sufficiently compensating for, or offsetting, such burdens through privacy protections.”² HHS also warns that the unintended consequences of privacy rules that fail to consider all of the nuances of our health care system could “impede the transformation of the health care system from a system that pays for procedures and services to a system of value-based health care that pays for quality care.”³

Model 672 Should be the Starting Point for Future Discussions

In order to begin a gap analysis, we suggest that the Working Group use Model 672 as a starting point to build the foundation. This Model provides the necessary framework and is a more accurate reflection of the NAIC’s, and state regulators’, most current perspective on privacy regulation. Most, if not all states, have adopted the provisions of Model 672 so it is the logical place for the Working Group to begin its consideration of possible revisions.

Any New Model Should Include a HIPAA Safe Harbor

The NAIC included a very important and well-established protection for carriers that comply with the federal HIPAA-privacy requirements in Model 672. That model provides that “[I]rrespective of whether a licensee is subject to the federal Health Insurance Portability and Accountability Act privacy rule as promulgated by the U.S. Department of Health and Human Services [insert cite] (the “federal rule”), if a licensee complies with all requirements of the federal rule except for its effective date provision, the licensee shall not be subject to the provisions of this Article V.”⁴

Rules that Apply to Technology Companies are not Appropriate for Health Insurers

When discussing privacy regulations for the insurance industry, the Working Group must be careful to not apply the same rules as would be applied to technology companies. Rules aimed at Google, Microsoft, Amazon, or other large technology companies are not necessarily appropriate for the health insurance industry, and in the case of privacy regulation, they clearly are not appropriate.

The New Privacy Model Must be Acceptable to Most States

Finally, it is important that the Working Group develop a consensus privacy model that will readily be adopted by most states. This is consistent with NAIC’s goals and with its model law development guidelines.

Federal Register, Vol. 86, No. 12, Thursday, January 21, 2021 at page 6447.

³ *Id.* at page 6447.

⁴ Model 672, §21

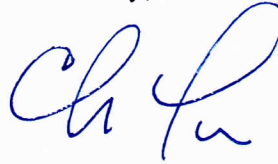
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Thank you for allowing us to comment. If you have any questions, please feel free to reach out to me at either (202) 247-0316 or cpetersen@arborstrategies.com. We look forward to working with the Working Group as it develops an appropriate work plan for discussing privacy issues.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ch Petersen", with a stylized, cursive script.

Chris Petersen

cc: Lois Alexander